IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 42

RALPH GINZBURG, DOCUMENTARY BOOKS, INC., EROS MAGAZINE, INC., LIAISON NEWS LETTER, INC.,

Petitioners,

—v.—

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC., AS AMICUS CURIAE

IRWIN KARP
120 Broadway
New York, N. Y.
Counsel for The Authors League of America, Inc., as amicus curiae.

32 CASE PRESS INC., 421 Hudson St., N.Y.—ORegon 5-4540

TABLE OF CONTENTS

AUTHORITIES CITED

Cases

Statutes

United States Constitution

Other Material Cited

IN THE

Supreme Court of the United States

October Term, 1965

No. 42

RALPH GINZBURG, DOCUMENTARY BOOKS, INC., EROS MAGAZINE, INC., LIAISON NEWS LETTER, INC.,

Petitioners,

—v.—

UNITED STATES OF AMERICA.

BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC., AS AMICUS CURIAE

The Interest of the Authors League

The Authors League of America, Inc., is an organization of professional writers and dramatists. One of its principal purposes is to express the views of its members in controversies involving rights of free press and free speech. Because the determination of this appeal may significantly affect those fundamental rights, The Authors League (with the consent of the parties) respectfully submits this brief.

ARGUMENT

I

Petitioners are entitled to the full protection of the First Amendment to the Constitution of the United States.

The Petitioners' brief presents the arguments in support of the position that the publications in question were not obscene. We need not reiterate them, for we respect-

fully submit that regardless of the determination of the issue of obscenity, the Petitioners are entitled to the full protection of the First Amendment and, therefore, that their convictions should be reversed.

The statute under which Petitioners were convicted and sentenced (18 U.S.C. 1461) does not deal with the separate and distinct problem of preventing the dissemination of obscene materials to minors (cf. *Butler* v. *Michigan*, 352 U.S. 380). Nor does it prohibit the dissemination of obscene material by means which invade the privacy of individual citizens. On the contrary, the statute is being applied here to punish Petitioners for mailing "obscene" publications to adults who have chosen to order them.

We submit that to apply the sanctions of a criminal obscenity statute in this context violates the Petitioners' rights of free press, guaranteed by the First Amendment, as well as the rights of adults (who voluntarily choose to do so) to read what Petitioners have published.

An obscenity statute, by its very existence, imposes a restraint upon the publication and distribution of unobscene, as well as obscene, literary works. A publisher or a bookseller may be imprisoned if he errs in his judgment that a given book is not obscene. This threat constitutes a significant deterrent—it is a risk that many a publisher and bookseller will not assume, even though they believe a work does not violate the statute.

The risk and the deterrent effect are magnified by the difficulty of determining where the line will be drawn. In *Jacobellis* v. *Ohio*, 378 U.S. 184, Mr. Justice Stewart said that "under the First and Fourteenth Amendments crimi-

nal laws in this area are constitutionally limited to hard core pornography," but he went on to say:

> "I shall not today attempt to define the kinds of material I understand to be embraced within that short hand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." (378 U.S. at p. 197)

If members of this Court have this difficulty, and can be divided in their opinions as to whether a particular work is obscene, and if State and Federal appellate courts experience similar difficulties (reflected not only in divided opinions but in contrary decisions on the same work), how much greater then is the uncertainty facing the publisher or bookseller who must stake his very freedom on the ultimate correctness of his judgment!

Moreover, an obscenity statute inevitably imposes a further restraint on the publication of unobscene, as well as obscene, works. A publisher or bookseller may be convinced that a book is not obscene; and his belief may ultimately be sustained by a decision of this Court or of the highest court of appeal in a State. But to vindicate that belief, he may be compelled to defend the book against prosecution, to undergo the burden and expense of trial and intermediate appeals—and sometimes of trials and appeals in several jurisdictions. The costs of defending one's right of freedom of press are heavy; many publishers and booksellers cannot afford to undertake them and, rather than run the risk of incurring them, will choose not to publish or sell unobscene works that may be attacked under

obscenity statutes.* (Cf. *Freedman* v. *Maryland,* 380 U.S. 51, 59.) The possibility that such a burden would have to be shouldered thus constitutes—*per se*—a formidable deterrent to the publication of unobscene works. (Cf. *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 303.)

In *Roth* v. *United States,* 354 U.S. 476, 488, the Court emphasized that "the fundamental freedoms of speech and press" are "indispensable" to our free society, and that the "door barring Federal and State intrusion . . . must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests." We respectfully submit that an obscenity statute, by its very existence and the threat of its invocation (albeit unsuccessfully) significantly restrains the full exercise of the rights of freedom of press and speech. Obviously this deterrent effect can only be completely avoided if the First Amendment prevented such a statute from being invoked under any circumstances. [Cf. *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 295 (concurring opinion); *Smith* v. *California,* 361 U.S. 147, 155 (concurring opinion); *Roth* v. *United States,* 354 U.S. 476, 508 (dissenting opinion).]

---

* On March 5, 1962, Publishers' Weekly reported that the Superior Court of Cook County, Illinois, had cleared Henry Miller's "Tropic of Cancer" against charges of obscenity. Publishers' Weekly commented: "Fighting brushfire censorship is a difficult, expensive job; 'Tropic' to date has been involved in some 60 court actions and innumerable extra-legal censorship campaigns. For those on the firing line—the publisher, and the booksellers and librarians involved—the situation still is far from clear. It is a situation in which all publishers who might ever think of publishing a 'difficult' book like 'Tropic,' have a stake."

Two years after this comment, this Court held that "Tropic of Cancer" was not obscene (Grove Press, Inc. v. Gerstein, 378 U.S. 577).

It may be necessary to open the door "the slightest crack" in order to prevent the dissemination of obscene materials to minors. It may be necessary to open the door "the slightest crack" to prohibit the dissemination of obscene materials by means which invade the privacy of individual citizens—e.g., to prohibit the display in public places of posters or magazine covers containing obscene matter, or other dissemination of obscene works by methods which force them upon individuals with no opportunity to accept or reject them of their own volition.

However, we submit that no public interest, superior to the preservation of the rights of free speech and free press, is served by permitting such a statute to be invoked where a book or other publication—regardless of content—is sold to adults and where it is published and disseminated in a manner that does not invade the right of privacy of individual citizens. In these circumstances, the fundamental rights of free press and free speech are unnecessarily and unconstitutionally abridged by the application of obscenity statutes which interfere with the process of communication between author (and publisher) and adults who voluntarily choose to read what they have written (and published). The process is essentially a private matter. The contents of a book—obscene or unobscene—only become known to those who choose to read it, or to continue reading it when they come upon objectionable portions. That choice is not legitimately the concern of other citizens, who are not compelled to read the objectionable work, nor should it be the concern of the State.

Where a publisher distributes a book or magazine to adults who are free to decide whether they will accept it or

reject it, read it or not read it, then, we submit neither the Federal nor the State governments should interfere with the right of the author to write, the publisher to publish, or the reader to read. In these circumstances, the absolute guaranty of the First Amendment can and should be retained. Not only are the rights of freedom of speech and press thus surely preserved, but each citizen is then free to make his own choice of reading material—which in a mature and free society is where the choice should rest.*

In *Public Utilities Commission* v. *Pollak*, 343 U.S. 451, Mr. Justice Douglas (dissenting) said, at page 469:

> "The right of privacy should include the right to pick and choose from competing entertainments, competing propaganda, competing political philosophies. If people are let alone in those choices, the right of privacy will pay dividends in character and integrity. The strength of our system is in the dignity, the resourcefulness, and the independence of our people. Our confidence is in their ability as individuals to make the wisest choice."

Here there is no evidence that Petitioners forced their publications on defenseless readers. Advertisements which were admittedly not obscene were mailed to prospective customers, but the publications themselves were only mailed to those who ordered them.

---

* "For indecency and vulgarity the fundamental remedy is the culture of audiences and readers, and the protests of critics. Jeremy Collier cured the profaneness and immorality of Restoration drama without any official authority. But the censorship, established not to clean up the stage, but to muzzle Henry Fielding, one of the greatest of British authors, made the theatre the most stagnant cultural institution in the country." (G. B. Shaw, *"Everybody's Political What's What?"*, pp. 198, 199).

II

A criminal obscenity statute applies an unnecessarily broad restraint on freedom of press.

In *Shelton* v. *Tucker,* 364 U.S. 479, Mr. Justice Stewart said:

> "In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means of achieving the same purpose." (at p. 488)

In *Marcus* v. *Search Warrant,* 367 U.S. 717, 731, the Court reiterated this point, stating:

> " . . . [U]nder the Fourteenth Amendment, a State is not free to adopt whatever procedures it pleases for dealing with obscenity . . . without regard to the possible consequences for constitutionally protected speech."

We respectfully submit that in view of the repressive effects of a criminal obscenity statute on the publication of unobscene works, it constitutes so drastic a means—when applied *ab initio*—of preventing dissemination of obscene works, as to be in violation of the First Amendment. It confronts publishers and booksellers with what may be a choice between rejecting a book or—jail. The risk is so substantial that in the case of many unobscene works the choice will be in favor of rejecting the work or refusing to sell it. We submit that so drastic and broad a means of dealing, at

the outset, with the problem of obscene works infringes the First Amendment, when a less restrictive method is available.

In *Freedman* v. *Maryland,* 380 U.S. 51, the court said:

> "In *Kingsley Books, Inc.* v. *Brown,* 354 U.S. 436, we upheld a New York injunctive procedure designed to prevent the sale of obscene books. That procedure postpones any restraint against sale until a judicial determination of obscenity following notice and an adversary hearing. The statute provides for a hearing one day after joinder of issue; the judge must hand down his decision within two days after termination of the hearing." (at p. 60)

We respectfully submit that neither publisher nor bookseller should be subjected to any criminal sanctions unless they continue to disseminate any work which has been adjudged obscene in a non-penal, adversary procedure such as that provided by the New York Injunction Section. (New York Code of Criminal Procedure, Sec. 22-a).

III

Petitioners were entitled to have the publications judged on the basis of their contents.

Petitioners were entitled to have each publication judged solely on the basis of its contents under the standards laid down by this Court. However, it would appear from the opinion of the Court of Appeals that other factors were considered and may have had some part in the judgment of the works involved. We submit that such other factors should not have been considered. The fact that the Peti-

tioners were motivated by a desire to collect profits from their publications does not make the publications any more or less obscene (338 F. 2d 12, 15). Moreover, the presence of a profit motive should not diminish the Petitioners' protection under the First Amendment—both the profession of writing and the business of publishing depend for their very existence on profits. (Cf. *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 266).

Nor were Petitioners' publications made any more or less obscene by the Petitioners' predilection for selecting unusual mailing addresses or by the standards which they used in choosing an editor (338 F. 2d at p. 13).

Consideration of these extraneous circumstances obviously increased the distaste with which the Court of Appeals viewed the Petitioners and their activities and may to some extent have influenced its judgment on the sole question—whether the publications on trial were obscene under the standards laid down by this Court.

IV

The "social importance" of petitioners' publications was not judged by the proper standards.

In *Jacobellis* v. *Ohio*, 378 U.S. 184, Mr. Justice Brennan said, " . . . a work cannot be proscribed unless it is 'utterly' without social importance" (378 U.S. at p. 191). It would appear that the Petitioners' publications were judged by a much more restrictive standard than this. The Court of Appeals apparently felt that only "authentic artistic efforts that may incidentally have four letter words or nudity or sex as an integral part of the work" are in the category of

works that have sufficient redeeming social importance in a case where obscenity is charged (338 F. 2d at p. 15). We respectfully submit that this test is contrary to the standards laid down by the Court in *Roth* v. *United States* and *Jacobellis* v. *Ohio*.

CONCLUSION

It is respectfully submitted that petitioners' convictions should be reversed.

Respectfully submitted,

IRWIN KARP
120 Broadway
New York, N. Y.
Counsel for The Authors League of America, Inc., as amicus curiae.

Certificate of Counsel

I hereby certify that I am counsel for the amicus curiae The Authors League of America, Inc. and that the foregoing brief in support of the appeal is in my opinion well founded in law and fact and is proper to be filed herein and is presented in good faith and not for delay.

Respectfully submitted,

IRWIN KARP
120 Broadway
New York, N. Y.
Counsel for The Authors League of America, Inc., as amicus curiae.

Letters of Consent

(Letterhead of)

OFFICE OF THE SOLICITOR GENERAL
Washington, D.C. 20530

September 9, 1965

Irwin Karp, Esq.
Hays, St. John, Abramson & Heilbron
120 Broadway
New York 5, N. Y.

Re: Ginzburg, et al. v. United States
(No. 42)

Dear Mr. Karp:

I am pleased to consent to your filing of a brief *amicus curiae* in the above-captioned case on behalf of the Authors' League of America, Inc. This is with the understanding that your brief will be filed contemporaneously with the petitioners'.

Sincerely,

/s/ THURGOOD MARSHALL
Thurgood Marshall
Solicitor General

Letters of Consent

(Letterhead of)

DICKSTEIN & SHAPIRO

September 7, 1965

Irwin Karp, Esq.
120 Broadway
New York, New York

Re: *Ginzburg, et al.* v. *United States*
No. 42, Oct. Term 1965

Dear Mr. Karp.

On behalf of petitioners in the above cause, I hereby consent to the filing of an amicus brief by the Authors League of America, Inc.

Very truly yours,

/s/ SIDNEY DICKSTEIN
Sidney Dickstein
Attorney for Petitioners

SD/deb